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In the Supreme Court of the United States

October Term 1981

COMMONWEALTH OF PENNSYLVANIA,
Cross-Petitioner-Appellant,

v.

ANN GORSUCH, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Cross-Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief Of Cross-Respondent, Monongahela Power Company, Intervenor Below, In Opposition To Cross-Petition For Writ of Certiorari

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QUESTION PRESENTED

Did the Court of Appeals err in sustaining the Environmental Protection Agency's decision to approve in part, sulfur dioxide emission limitations for sources in West Virginia, including Monongahela Power Company's[1] Harrison Power Station, as complying with Section 110(a) (2) (E) of the 1977 Amendments to the Clean Air Act, 42 U.S.C. §7410(a)(2)(E).

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[1]Affiliates of Monongahela Power Company are Allegheny Power System, Inc., Allegheny Power Service Corporation, West Penn Power Company and The Potomac Edison Company.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 307(d) of the Clean Air Act, 42 U.S.C. §7607(d), *Administrative Proceedings and Judicial Review*, provides:

> Rulemaking
>
> (d) (1) This subsection applies to—
>
> . . .
>
> (B) the promulgation or revision of an implementation plan by the Administrator under Section 110(c) of this title.
>
> . . .
>
> (3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under Section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—
>
> (A) the factual data on which the proposed rule is based;
>
> (B) the methodology used in obtaining the data and in analyzing the data; and
>
> (C) the major legal interpretations and policy considerations underlying the proposed rule.
>
> The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under Section 109(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of

these recommendations, an explanation of the reasons for such differences. All data, information and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

. . .

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

Clean Air Act, §307(d)(1), (3) and (9).

SUMMARY OF ARGUMENT

One of the consistent statutory features of the Clean Air Act has been the division of responsibilities between the individual states and the Environmental Protection Agency ("EPA") pursuant to Section 110(a)(2), 42 U.S.C. §7410(a)(2). This division of responsibilities was established by the 1970 Amendments to the Clean Air Act. In 1975 it was thoroughly explored by this Court in the case of *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). The Clean Air Act was amended in 1977 but the interstate provisions, added to Section 110(a)(2)(E), 42 U.S.C. §7410(a)(2)(E), were designed

simply to insure that air quality standards were applied without regard to political boundaries. This was an objective of the Clean Air Act even before the 1970 Amendments. *United States v. Bishop Processing Company*, 423 F.2d 469 (4th Cir. 1970). Neither the addition of Section 110(a)(2)(E), nor any other amendment changed the federal-state relationships in Section 110(a)(2).

EPA, acting in accordance with its mandatory responsibility to approve a state implementation plan for achieving air quality goals which complies with the requirements of Section 110(a)(2), including Section 110(a)(2)(E), approved the implementation plan proposed by West Virginia for the Harrison Power Station as well as other sources in West Virginia. Its approval included an explicit finding that the state plan, as revised for the Harrison Power Station, would not cause interstate pollution. Since questions were raised as to the ability of West Virginia's implementation plan to provide for attainment of the secondary National Ambient Air Quality Standard for sulfur dioxide, EPA advised West Virginia it would have to submit a new demonstration of adquacy or a new plan with a new demonstration.

EPA conducted a specific analysis and made explicit findings with respect to West Virginia's implementation plan revision and the applicable provisions of Section 110(a)(2)(E). EPA's rulemaking record was examined exhaustively by the Court of Appeals. Extensive briefs were filed by five different parties. Two oral arguments on requests for stay pending appeal were heard by the Court of Appeals, as was an oral argument on the merits.

The decision of the Court of Appeals, issued without an opinion, reflects the fact that the rulemaking record was sufficient for judicial scrutiny, and that the Court of Appeals found more than adequate support in the record for EPA's determinations.

ARGUMENT

I. THE DECISION BELOW DOES NOT RAISE QUESTIONS CONCERNING FEDERAL-STATE RELATIONSHIPS UNDER THE CLEAN AIR ACT.

In *Train v. Natural Resources Defense Council* ("*Train*"), 421 U.S. 60 (1975) this Court examined the relationship between the EPA and the states in developing and approving state implementation plans for achieving National Ambient Air Quality Standards ("NAAQS"). In its opinion, this Court concluded that:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under Section 110(a)(2)[of the Clean Air Act], the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements.

421 U.S. 79 (footnote omitted) (Emphasis added).

Nothing in the instant case suggests that a reexamination of the federal-state relationship recognized in *Train* is necessary. The 1977 Amendments to the Clean Air Act added four new general requirements to Section 110(a)(2), 42 U.S.C. §7410(a)(2). Among them is Section 110(a)(2)(E), 42 U.S.C. §7410(a)(2)(E). This Section requires the Administrator, before approving an implementation plan, to make a determination that it contains adequate provisions to prohibit any stationary source from emitting any air pollutant in amounts which prevent attainment and maintenance of the NAAQS in another state. It also requires the Administrator to determine whether the state implementation plan will interfere with mea-

sures in any other state to prevent significant deterioration of air quality or to protect visibility. In effect, Section 110(a) (2) (E) simply provides that air quality goals are to be achieved without regard to political boundaries.

Section 126 of the Clean Air Act, 42 U.S.C. §7426, entitled "Interstate Pollution Abatement", was added to the 1977 Amendments in order to: (1) insure issuance of a written notice to all affected states concerning the existence of sources with potential interstate impacts; and (2) provide a procedure for one state to open an already approved state implementation plan, where a major source is emitting in violation of Section 110(a) (2) (E). While Section 110(a) (2) (E) cross references Section 126, the state and federal relationships embodied in Section 110(a) (2) are not altered by Section 126. The notice required by Section 126(a) is simply another requirement imposed on individual state implementation plans, which the states must provide for in the first instance. The adequacy of West Virginia's state implementation plan in this regard is not an issue in the instant proceedings. Similarly, the governing federal-state relationships when a plan is reopened pursuant to Sections 126(b) and (c) were not before the Court of Appeals.[2] All that was before the Court of Appeals in the instant case was EPA's decision pursuant to Section 110(a) (2).

The proceeding before EPA in the instant case, an implementation plan revision, was initiated by West Virginia pursuant to Section 110(a) of the Clean Air Act, not Section 126. Nothing in the 1977 Amendments to the Clean Air Act suggests that a change was intended in the federal-state division of responsibilities created by the 1970 Amendments. The states still have the initial responsibility under Section 110(a) (2) to

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[2]Pennsylvania, New York and Maine have filed Section 126(b) petitions with EPA alleging that all major sources of sulfur dioxide in 7 states create air quality problems in portions of their states. None of the petitions were filed before November 10, 1980. The EPA's record in this matter has not been closed and no final decision has been issued.

devise the mix of emission limitations they deem best suited to their particular situation. *Train, supra*, 421 U.S. at 80. EPA still must approve the plan if it meets the 12 (rather than the 8 in the 1970 Amendments) standards contained in Section 110(a)(2). *Id.* States which feel they are aggrieved by their neighbor's implementation plan have the opportunity to examine the basis of EPA's proposed action, to transmit their comments to EPA and to seek judicial relief. It is, in fact, the course cross-petitioner has followed.

EPA's role *vis-a-vis* the petitioning and responding states, when a petition is filed pursuant to Section 126(b), and the petitioning and responding state's resulting burdens were not at issue in the Court of Appeals. The decision in *Train, supra*, has not been eroded by its progeny. It has been affirmed by the Courts of Appeals in implementation plan revision cases as well as cases involving interstate determinations made pursuant to Section 110(a)(2)(E). *See Florida Power & Light Co. v. Costle*, 650 F.2d 579, 580 (5th Cir. 1981); *Connecticut v. EPA*, 656 F.2d 902, 906 (2d Cir. 1981); *Mission Industrial, Inc. v. EPA*, 547 F.2d 123 (1st Cir. 1976). Nothing in the record before the Court of Appeals suggests that this Court's decision in *Train* should not be applied in this case. The passage of time has added to the validity of the holding in *Train* and its application in this case is consistent with the statutory structure which dictated the *Train* decision.

II. THE DECISION BELOW DOES NOT DEPART FROM ACCEPTED PRINCIPLES OF LAW.

Cross-petitioner's second reason for granting the petition is that the Court of Appeals erred in not remanding the matter to EPA to make an explicit determination of compliance with the interstate provisions of the Clean Air Act. Contrary to cross-petitioner's statement, however, EPA did make the required analysis and findings. EPA was also explicit in expressing its findings.

EPA specifically analyzed the interstate impacts from the Harrison Power Station on Pennsylvania both before and after EPA's voluntary remand. As reported in the notice of proposed rulemaking:

> Modeling was also performed for receptors within the Commonwealth of Pennsylvania and it was found that emissions from the plants will not prevent attainment of the SO_2 standards in Pennsylvania.

J.A. 2[3] (*Federal Register* notice, November 7, 1979).

The empirical analysis which led to that finding was also reported and made part of the record. J.A. 427.

EPA also explained why, in its judgment, the empirical information it had developed was sufficient to support a determination that the Harrison Power Station's emissions would not interfere with Pennsylvania's air quality goals even in areas where empirical data was not available:

> [A]ir pollution does not become more concentrated at greater distances from a source, it becomes less concentrated, so a look at the concentrations as the plume enters Pennsylvania will give an upper bound on the maximum concentrations which would occur in the state.

J.A. 425.

As required by the Clean Air Act, EPA approached its analysis of the air quality impacts of emissions from the Harrison Power Station without regard to political boundaries. J.A. 408, 425-427. EPA reiterated its findings in its reexamination after the remand (J.A. 1449) and in the notice of final rulemaking. J.A. 4; Appendix B to Cross-Petition, p. 28.

At best, cross-petitioner's argument is one of form over substance. In the *Federal Register* notice of final rulemaking

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[3]Reference to the Joint Appendix submitted to the Court of Appeals for the Fourth Circuit shall be designated "J.A." followed by the appropriate page number.

EPA states that: "West Virginia's proposed SIP revision will attain and maintain the primary SO_2 NAAQS and to this extent meets the requirements of Section 110(a) of the Clean Air Act and 40 CFR Part 51." J.A. 4; Appendix B to Cross-Petition, p. 28. EPA's determination is clearly not limited to air quality in West Virginia but includes interstate impacts. Apparently, Pennsylvania believes that in order to be explicit the *Federal Register* notice should have contained 50 separate findings—one for each state in the United States. It is an absurd argument.

The controlling provisions of the Clean Air Act require that a promulgated rule be accompanied by a statement of its basis and purpose. Section 307(d)(6)(A) of the Clean Air Act, 42 U.S.C. §7607(d)(6)(A). These provisions also require that a response be made to each of the significant comments, criticisms and new data submitted in written or oral presentations during the comment period. Section 307(d)(6)(B) of the Clean Air Act, 42 U.S.C. §7607(d)(6)(B). The Clean Air Act does not require, as cross-petitioner seems to suggest, that all of this information be set forth in the *Federal Register* or contained in one document. Nor is this an issue which this Court should address, since the statutory requirements are clear and it has already been examined. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972), *cited in Baltimore & O.C.T.R. v. United States*, 583 F.2d 678, 688 (3d Cir. 1978).

The decision of the Court of Appeals was not based on *post hoc* rationalizations by EPA. EPA did refuse cross-petitioner's request to apply certain long-range modeling techniques which it concluded were unreliable and unsuitable for regulatory use. J.A. 1453. EPA has no obligation, however, to employ forms of technical analysis which are not reliable or which will not advance the precision, completeness or accuracy of its decisionmaking. *Cleveland Electric Illuminating Co. v. EPA*, 572 F.2d 1150 (6th Cir. 1978), *cert. denied*, 439 U.S. 910 (1978).

EPA explained in detail, on the rulemaking record, its reasons for rejecting the conclusions cross-petitioners sought. *See, e.g.,* J.A. 444, 1445-1475. EPA's findings are explicit, precise and easily discernible from the record—a fact which is supported by the extent to which that record was scrutinized by the cross-petitioner in its brief in the Court of Appeals.

After a thorough and careful examination of the relevant material, EPA found cross-petitioner's position as to interstate pollution to be unsound. The Court of Appeals, after review of extensive briefs, which contained an exhaustive examination of the record, dismissed the petitions for review. The issues before the Court of Appeals involved no important questions of federal law which should be settled by this Court. The decision of the Court of Appeals does not depart from accepted principles, embodied in the Clean Air Act, that the Court may reverse the action of the EPA only where such action is found to be aribitrary, capricious, an abuse of discretion, contrary to constitutional right or in excess of statutory jurisdiction. Section 307(d)(9) of the Clean Air Act, 42 U.S.C. §7607 (d)(9). The cross-petition for writ of certiorari should, therefore, be denied. *Rules of the Supreme Court of the United States,* R. 17.1.

CONCLUSION

For the reasons stated above, cross-respondent, Monongahela Power Company, requests this Court to deny the cross-petition for writ of certiorari by the Commonwealth of Pennnsylvania.

Respectfully submitted,
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